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CITATIONS

Case:

Simon v. *Hoey*, No. 757 ..... 4, 6

Statute:

Revenue Act of 1938, c. 289, 52 Stat. 447:

Sec. 161 2

Sec. 162 3

In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 758

FRED M. CARTER AND THE CHASE NATIONAL BANK OF THE CITY OF NEW YORK, AS EXECUTORS OF THE LAST WILL AND TESTAMENT OF SELINA C. CORNISH, DECEASED, PETITIONERS

v.

JANE M. HOEY, AS EXECUTRIX OF THE LAST WILL AND TESTAMENT OF JAMES J. HOEY, DECEASED, FORMERLY COLLECTOR OF INTERNAL REVENUE OF THE UNITED STATES OF AMERICA FOR THE SECOND DISTRICT, NEW YORK, AND REA FORHAN PEDRICK, AS ADMINISTRATRIX OF THE ESTATE OF WILLIAM J. PEDRICK, DECEASED, FORMERLY COLLECTOR OF INTERNAL REVENUE OF THE UNITED STATES OF AMERICA FOR THE SECOND DISTRICT, NEW YORK

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 188-191) is reported at 88 F. Supp. 765. The *per curiam*

opinion of the Court of Appeals (R. 201) is reported at 180 F. 2d 353.

JURISDICTION

The judgment of the Court of Appeals was entered January 30, 1950. (R. 202.) The petition for a writ of certiorari was filed April 17, 1950. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254.

QUESTION PRESENTED

Whether capital gain realized by an estate in the course of its administration, and distributed to legatees as part of the corpus of their legacies, is taxable to the estate or to the legatees under Section 162(c) of the Revenue Act of 1938.

STATUTE INVOLVED

Revenue Act of 1938, c. 289, 52 Stat. 447:

> SUPPLEMENT E—ESTATES AND TRUSTS
>
> SEC. 161. IMPOSITION OF TAX.
>
> (a) *Application of Tax.*—The taxes imposed by this title upon individuals shall apply to the income of estates or of any kind of property held in trust, including—
>
> * * * * *
>
> (3) Income received by estates of deceased persons during the period of administration or settlement of the estate; * * *
>
> * * * * *
>
> (b) *Computation and Payment.*—The tax shall be computed upon the net income of the

estate or trust, and shall be paid by the fiduciary * * *.

SEC. 162. NET INCOME.

The net income of the estate or trust shall be computed in the same manner and on the same basis as in the case of an individual, except that—

* * * * *

(c) In the case of income received by estates of deceased persons during the period of administration or settlement of the estate, and in the case of income which, in the discretion of the fiduciary, may be either distributed to the beneficiary or accumulated, there shall be allowed as an additional deduction in computing the net income of the estate or trust the amount of the income of the estate or trust for its taxable year, which is properly paid or credited during such year to any legatee, heir, or beneficiary, but the amount so allowed as a deduction shall be included in computing the net income of the legatee, heir, or beneficiary.

STATEMENT

The facts as stipulated (R. 36-49) and found by the District Court (R. 188-191) may be summarized as follows:

The decedent, Selina C. Cornish, died a resident of the State of New York on May 18, 1938. She was the residuary legatee named in the will of her husband, Edward J. Cornish, who predeceased her by about two weeks and whose estate is the

petitioner for a writ of certiorari in the companion case (No. 757, this Term). The decedent's will left one-half of her residuary estate to her husband, and the other half to a charitable trust; the bequest to the husband lapsed by reason of his having predeceased her and passed by intestacy to the decedent's distributees under the law of New York. By a second codicil to her will, executed after her husband's death, the decedent bequeathed her interest as residuary legatee under her husband's will to the persons who would have taken it had her husband survived her and died intestate. (R. 188-189.) Neither the will nor the codicils made any provision regarding the distribution of income realized by the estate during the period of administration. (R. 37, 50-64.)

The husband's estate realized a capital gain from the sale of assets, and his executors distributed such gain to the decedent's estate as residuary legatee under his will. The decedent's executors paid to the persons named in the second codicil to her will most of the capital gain realized by and received from the husband's estate. (R. 188-189.)[1]

During its first fiscal year ending April 30, 1939, the decedent's estate realized from a sale of

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[1] In the companion case, involving the husband's estate, the courts below held that the capital gain realized by that estate and distributed to decedent's estate was distributed as corpus, and hence was taxable to the husband's estate under Section 162(c) of the Revenue Act of 1938, *supra*. (No. 757, R. 114-133, 140.)

capital assets a capital gain of $527,320.95. One half of this gain ($263,660.47) was paid to the distributees who took half of the decedent's residuary estate by intestacy. The balance was paid to the charitable trust to which decedent had left the other half of her residuary estate. The capital gain thus distributed was recorded in a separate bookkeeping account. The executors filed an intermediate account in the Surrogate's Court of New York in which the capital gain was charged to principal and the distributions therefrom were credited to principal. The decree of the Surrogate's Court approved the account as filed. (R. 189-191.)

In the estate's income tax return for the fiscal year ending April 30, 1939, and pursuant to a ruling requested by decedent's executors from the Commissioner of Internal Revenue, the capital gain realized by the husband's estate and paid to the decedent's estate was treated as taxable income to the former estate; and $263,660.47 of the capital gain realized by the decedent's estate and paid to her distributees was treated as taxable to decedent's estate. Thereafter, the executors filed a claim for refund of the tax attributable to the capital gain reported as income of decedent's estate. The claim for refund was rejected and this suit followed. (R. 190-191.)

The executors contended that the capital gain realized by decedent's estate and paid to her distributees was taxable to the distributees rather

than to the estate under Section 162(c) of the Revenue Act of 1938. The District Court held that the capital gain was distributed as corpus, not as income, and hence was taxable to the estate rather than to the distributees. (R. 191.) The Court of Appeals affirmed *per curiam*. (R. 201.)

ARGUMENT

This case presents the same question as does the companion case of *Simon* v. *Hoey*, in which a petition for a writ of certiorari has also been filed (No. 757, October Term, 1949). The grounds asserted for granting the writ in this case (Pet. 8) are identical with those asserted in the petition in that case. For the reasons discussed in the Government's opposing brief in the companion case, to which reference is hereby made, the petition should be denied. The decision below is in accord with established principles. There is no conflict, and no occasion for further review.

Respectfully submitted,

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MAY, 1950.

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